

NO. 2002-58734

HENRY T.T. LUCKY, INC., ET AL

VS.

ESTATE OF DAE KIM, DECEASED;
CHOON H. KIM AND JIMMY J. KIM
D/B/A BELL CLEANERS; ET AL§
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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

152ND JUDICIAL DISTRICT

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
JUN 14 2005 PM 3:06PLAINTIFF'S TENTH AMENDED PETITION

Plaintiff Henry T.T. Lucky, Inc. ("HTTL" or "Plaintiff") files this its Tenth Amended Petition against Defendants Estate of Dae Kim, Deceased, Choon H. Kim and Jimmy J. Kim, d/b/a Bell Cleaners ("Kim Defendants" or "Bell Cleaners"); Pentejas, Inc. d/b/a Associated Environmental Consultants, Inc. ("Pentejas" or "AEC"); Mid-American Properties, Inc. ("Mid-American"); Harkrider Distributing Co., Inc. ("Harkrider"); The Dow Chemical Company ("Dow"); Cecil Helderman ("Helderman") and MetroBank, N.A. ("MetroBank") (collectively, "Defendants") and respectfully shows as follows:

DISCOVERY CONTROL PLAN

1. Plaintiff requests that discovery be conducted in this matter under Level 2 of Rule 190 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 190.3.

PARTIES

2. Plaintiff Henry T. T. Lucky, Inc. is a Texas corporation with its principal place of business in Houston, Harris County, Texas.

3. Defendant The Estate of Dae Kim ("Kim"), Deceased, is an estate administered by Choon H. Kim, an individual residing in Harris County, Texas, doing business as Bell

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Cleaners, with Choon H. Kim and Jimmy J. Kim. The Estate of Dae Kim has been duly served and filed its answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

4. Defendant Choon H. Kim ("Kim"), an individual residing in Harris County, Texas, is doing business as Bell Cleaners, with The Estate of Dae Kim and Jimmy J. Kim. Choon H. Kim has been duly served and filed her answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

5. Defendant Jimmy J. Kim ("Kim"), an individual residing in Harris County, Texas, is doing business as Bell Cleaners, with The Estate of Dae Kim and Choon H. Kim. Jimmy J. Kim has been duly served and filed his answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

6. Defendant Pentejas, Inc. ("Pentejas" or "AEC") is a Texas corporation d/b/a AEC, with its principal place of business in Fort Bend County, Texas. It has been duly served and filed its answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

7. Defendant Mid-American Properties, Inc. ("Mid-American") is a Texas corporation with its principal place of business in Waco, McLennan County, Texas. Mid-American has been duly served and filed its answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

8. Defendant Harkrider Distributing Co., Inc. ("Harkrider") is a Texas corporation with its principal place of business in Houston, Harris County, Texas. Harkrider has been duly served and filed its answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

9. Defendant The Dow Chemical Company ("Dow") is a Delaware corporation with its principal place of business in Midland, Michigan and registered as a foreign corporation

doing business in Texas. Dow has been duly served and filed its answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

10. Defendant Cecil H. Helderman ("Helderman") is an individual residing in Plantersville, Grimes County, Texas. Helderman has been duly served and filed his answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

11. Defendant MetroBank, N.A., ("MetroBank") is a Texas corporation with its principal place of business in Houston, Texas. MetroBank has been properly served and has filed and answer pursuant to Rule 21a of the Texas Rules of Civil Procedure.

JURISDICTION

12. The Court has jurisdiction over Defendants because all Defendants are Texas residents, registered to do business in Texas or have sufficient nexus with Texas as to subject themselves to the jurisdiction of this Court. All Defendants are amenable to service of process by a Texas court. The Court has jurisdiction over the controversy because Plaintiff has suffered damages in an amount in excess of \$7,790,000.00.

VENUE

13. Venue is proper in Harris County, Texas, because Plaintiff's Property is located in Harris County, Texas, and because all or a substantial part of the events or omissions giving rise to the claims occurred in Harris County, Texas.

AFFIRMATIVE DEFENSE

14. Plaintiff asserts the affirmative defense of Equitable Estoppel to all Defendants' Statute of Limitations affirmative defense.

STATEMENT OF THE CASE

15. The release of contaminants from the dry cleaning facility has materially and substantially interfered with HTTL's property rights. Because the Operators (**Kim Defendants, Bell Cleaners**), the Investigator (**AEC**), the Manufacturer (**Dow**), and the Distributor (**Harkrider**) have caused, contributed to, permitted, or failed to stop the release of these contaminants, the physical condition and value of HTTL's Property has been permanently harmed.

16. With respect to Defendants Dow and Harkrider, Plaintiff alleges that such Defendants sold and/or chemicals, equipment or supplies to Defendant Kim used in Defendant Kim's dry cleaning business and that such chemicals, equipment or supplies caused or contributed to Defendant Kim's discharge of spent dry cleaning solvents into the soil and groundwater of Plaintiff's Property.

17. At all times material to this action, Dae Kim, deceased, owned and operated a business known as Bell Cleaners, which is located in Suite 101 of Plaintiff's Shopping Center ("the Dry Cleaners"). At the time Plaintiff acquired the Shopping Center, Defendant Kim was already a tenant. On information and belief, Defendant Kim had been a tenant of the Shopping Center since the mid-1980s. The Dry Cleaners utilized a variety of hazardous substances, including tetrachloroethylene, also known as perchloroethylene or "perc" ("PCE"). Over the years, these chemicals have been released into the soils and groundwater of the Shopping Center.

18. While Defendant Kim owned, controlled and/or operated the Dry Cleaners, he caused, permitted and allowed hazardous substances that present an imminent and substantial

danger to the public health and environment to be located, stored, utilized, disposed of, and released at the Dry Cleaners.

19. Throughout his years of ownership, operations, and control of the Dry Cleaners, Defendant Kim contracted with Defendant Harkrider for dry cleaning chemicals and supplies, including, but not limited to perc manufactured by Defendant Dow for use in his Dry Cleaning business located on the Plaintiff's property. The use of these chemicals contributed to the contamination problems created by the Dry Cleaners at the property. Not only did the chemicals themselves cause the contamination, but the suppliers failed to properly train Defendant Kim and his personnel on the proper use, storage and disposition of these chemicals.

20. As a result of Defendant Kim's acts and/or omissions in causing, permitting and allowing the escape of Hazardous Substances from the Dry Cleaners, the soils and groundwater of Plaintiff's Property have been severely contaminated. Defendant Kim's severe contamination of Plaintiff's Property has substantially damaged Plaintiff's Property, thereby preventing Plaintiff from obtaining the full use and enjoyment of its Property.

21. As a result of the Kim Defendants' acts and/or omissions in causing, permitting and allowing the escape of Hazardous Substances from the Dry Cleaners on and into the soils and groundwater, Plaintiff's Property has been severely contaminated. The Kim Defendants severe contamination of Plaintiff's Property has substantially damaged Plaintiff's Property, thereby preventing Plaintiff from obtaining the full use and enjoyment of its Property. Each of the Defendants engaged in conduct, set forth more fully below, that caused or contributed to the contamination of the soils and groundwater of Plaintiff's Property. This contamination continues to spread in the soils and groundwater of Plaintiff's Property. Regardless of what

portion of such contamination each Defendant caused, Plaintiff alleges that Defendants are jointly and severally liable for all costs and damages suffered by Plaintiff as a result of the combined effects of the acts and/or omissions of Defendants.

22. As a result of Defendants' actions and/or omissions and the continuing contamination of Plaintiff's Property, Plaintiff has been permanently and irreparably damaged in an amount in excess of Two Million Two Hundred Ten Thousand and No/100 Dollars (\$2,210,000.00).

23. In the alternative, Plaintiff seeks recovery of the diminution of fair market value of Plaintiff's Property in the amount of Seven Million Seven Hundred Ninety Thousand and No/100 Dollars (\$7,790,000.00), which includes the diminution in value of the property, costs of delineating, remediating and removing the contamination on Plaintiff's Property, costs of preventing further contamination of Plaintiff's Property, costs of protecting the public and the environment from such contamination, costs of installing, utilizing, renting or acquiring equipment and services to monitor for and detect contaminants in the soils and groundwater of Plaintiff's Property and the surrounding property, and consequential and incidental damages caused by the contamination of Plaintiff's Property. Additionally, the Plaintiff has suffered and will suffer economic damages, expenses, stigma damages, and substantially increased operational costs directly arising from Defendant Kim's contamination of Plaintiff's Property.

24. Alternatively, as a result of the actions and omissions of the Kim Defendants, Plaintiff has been damaged in an amount in excess of Ten Million and No/100 Dollars (\$10,000,000.00). Plaintiff seeks, in part, recovery of reasonable costs of restoring Plaintiff's Property to its condition before the contamination, the loss of use and enjoyment of Plaintiff's

Property, reasonable costs of delineating, and removing the contamination on Plaintiff's Property, reasonable costs of preventing further contamination of Plaintiff's Property, reasonable costs of protecting the public and the environment from such contamination, reasonable costs of installing, utilizing, renting or acquiring equipment and services to monitor for and detect contaminants in the soils, surface water, sediments and groundwater of Plaintiff's Property, and consequential and incidental damages caused by the contamination of Plaintiff's Property. Additionally, the Plaintiff has suffered and will suffer economic damages, stigma damages, and substantially increased operational costs directly arising from Defendants' contamination of Plaintiff's Property.

CAUSES OF ACTION AGAINST DEFENDANTS

COUNT 1 - NUISANCE

25. Plaintiff incorporates the preceding paragraphs by reference.

26. The release of contaminants from the dry cleaning facility has materially and substantially interfered with HTTL's property rights. Because the Operators, the Manufacturer, and Distributor have caused, contributed to, permitted, or failed to stop the release of these contaminants, the physical condition and value of HTTL's Property has been permanently harmed.

27. The conduct described above was unreasonable under the circumstances. The Operators', Manufacturer's and Distributor's interference with HTTL's property was negligent in that the Operators, Manufacturer and Distributor knew or should have known that that their conduct of using, manufacturing and distributing hazardous chemicals such as perc involved an unreasonable risk that such hazardous chemicals would be released into the environment. The

Operators, specifically Bell Cleaners and the Kim Defendants have actively engaged in an attempt to conceal such contamination.

28. Alternatively, the negligent interference with HTTL's Property by the Operators, resulted from the Operators', Manufacturer's and Distributor's failure to use reasonable care. The continued leaching and migration of contaminants constitutes a continuing nuisance.

29. The condition caused by the release of contaminants in groundwater suitable for drinking constitutes a nuisance per se.

30. Alternatively, the release of contaminants has resulted in a public nuisance by polluting nearby drinking wells, which were suitable drinking water sources for Harris County and surrounding communities.

COUNT 2 - TRESPASS

31. The Operators intentionally invaded HTTL's property rights by releasing or failing to control the release of tangible pollutants and contaminants into soil, surface water, and groundwater that physically entered and caused harm to HTTL's Property. Their conduct was intentional in that they disposed of wastes, an immediate and inevitable consequence of which was the release of pollutants or contaminants into the environment.

32. The Operators knew, or should have known, that such pollutants and contaminants were being released into the environment and have continued to permit the release of such pollutants and contaminants in furtherance of their business activities. The continued leaching, migration, and emission of contaminants from the dry cleaning establishment constitute a continuing trespass. Yet, and despite such intentional acts, the Operators, and specifically Bell

Cleaners and the Kim Defendants have actively engaged in an attempt to conceal such contamination.

COUNT 3 – DEFENDANT KIM'S BREACH OF CONTRACT

33. Pursuant to Paragraph 2.3 of the Shopping Center Lease (the "Agreement") Defendant Kim is obligated to "maintain the Premises in compliance with all laws, ordinances, building codes, rules and regulations, present and future, of all governmental authorities." A determination was made that leakage from Bell Dry Cleaners occurred which contaminated the soils and groundwater with perc in violation of the Texas Health and Safety Code and the Texas Water Code. Accordingly, Kim is in breach of the Agreement.

34. Paragraph 4.1 of the Lease obligates Kim to, promptly service, maintain and keep in good repair and replace as necessary all parts of the premises, including equipment. Kim failed to comply with the terms of the Agreement relating to maintenance of the dry cleaning equipment in the space, proximately causing damage to HTTL.

35. HTTL seeks actual and consequential damages from Kim for breach of the Lease Agreement in an amount in excess of \$7,790,000.00.

36. HTTL seeks damages from Kim as a result of the breach of the Agreement related to the cost of remediation that has resulted from Kim's failure to maintain, repair and correct leakage of pollutants from the dry cleaning machinery. HTTL also seeks its reasonable and necessary attorneys' fees pursuant to the terms of the Lease Agreement and §38.001 et seq. of the Texas Civil Practices and Remedies Code.

COUNT 4 - FRAUD BY BELL CLEANERS AND THE KIM DEFENDANTS

37. Bell Cleaners and the Kim Defendants represented to HTTL that they were not releasing or failing to control the release of tangible pollutants and contaminants into soil, surface water, and groundwater that could physically enter and cause harm to HTTL's Property. Bell Cleaners and the Kim Defendants omitted to tell HTTL that they were releasing or failing to control the release of tangible pollutants and contaminants into soil, surface water, and groundwater that could physically enter and cause harm to HTTL's Property.

38. The continued leaching, migration, and emission of contaminants from the dry cleaning establishment by Bell Cleaners and the Kim Defendants constitutes fraud. It was reasonable, until competent environmental experts discovered the cover-up by Bell Cleaners and the Kim Defendants, for HTTL to believe their representations and/or omissions. The fraud by Bell Cleaners and the Kim Defendants has caused damage to HTTL because their actions have not only caused contamination but they have also increased the costs for the remediation that is now necessary. HTTL sues for all damages occasioned by such fraud including, but not limited to, actual damages, costs to remediate, costs to investigate, punitive damages and exemplary damages.

COUNT 5 - MID-AMERICAN BREACH OF CONTRACT

39. Mid-American Properties, Inc. breached its contract with HTTL by failing to accurately inform and disclose the environmental assessment and condition of the property prior to and during the sale to HTTL. As a result of Mid American's actions, HTTL has suffered damages in the amount of \$7,790,000.00. HTTL seeks all actual, special and consequential damages from Mid-American as a result of the breach of contract. HTTL also seeks its

reasonable and necessary attorneys' fees pursuant to the contract and §38.001 et seq. of the Texas Civil Practice and Remedies Code.

COUNT 6 – NEGLIGENCE

40. The Operators, Manufacturer, and Distributor owed HTTL a duty of ordinary care to refrain from conduct (either by their acts or omissions) that interfered with HTTL's use and enjoyment of its Property, that caused HTTL's Property to be invaded unreasonably by pollutants and contaminants, that burdened and encumbered HTTL's Property, or that otherwise unreasonably caused injury to HTTL's property rights. It was foreseeable that the disposal or improper use of dry cleaning equipment and/or chemicals could result in a release of pollutants and contaminants into the environment and that the Operators, the Manufacturers, and the Distributors' failure to mitigate the releases would result in harm to HTTL's property rights.

41. The failure of the Operators, Manufacturers and Distributors to exercise due care, has (a) caused a decrease in the value of HTTL's Property, (b) forced the HTTL to incur substantial investigation and remediation costs, and (c) caused other economic and financial harm.

42. Defendant Kim knew or should have reasonably foreseen that if their machinery or equipment was improperly used operated or maintained then Hazardous Substances could, and most likely would, escape during the operation of such dry cleaning operations such as those performed by Defendant Kim; and, in fact, as a result of misuse and improper maintenance of the machinery and equipment by Kim and supplies provided by Defendants Dow and Harkrider, the Dry Cleaners released hazardous substances that polluted the soils and groundwater and migrated, leached and/or discharged onto and into the soils and groundwater of the Shopping

Center and neighboring properties. Defendants Dow and Harkrider's failure to properly instruct and/or oversee and/or failure to warn about the use of the chemicals and supplies that it sold to Defendant Kim were a cause of the contamination of the property.

43. Defendant Kim, and Defendants Dow and Harkrider owed a duty to Plaintiff to exercise ordinary care in the manufacture sale and distribution of chemicals and supplies used in dry cleaning operations (with respect to Defendants manufacturing, selling and distributing chemicals and supplies); in the instruction and guidance on the use, storage and disposition of chemicals and supplies used (with respect to Defendants manufacturing, selling and distributing chemicals and supplies); and, in the proper and safe storage and disposition of said chemicals and supplies (with respect to Defendants manufacturing, selling and distributing chemicals and supplies); so as not to cause or contribute to the contamination of Plaintiff' property, soils and groundwater with hazardous substances.

44. Defendant Kim owed a duty to Plaintiff to exercise ordinary care in the testing, operation, maintenance and utilization of the equipment and machinery at Bell Cleaners so that such equipment and machinery is installed, operated and maintained in a manner and fashion so as not leak, or otherwise discharge hazardous chemicals and to prevent the escape and release of Hazardous Substances and their subsequent discharge in an unsafe and erroneous manner, such as onto and into the soils and groundwater of Plaintiff's Property. Said duty to exercise ordinary care in the testing, operation, maintenance and utilization of the equipment and machinery at Bell Cleaners so that such equipment and machinery is installed, operated and maintained in a manner and fashion so as not leak, or otherwise discharge hazardous chemicals and to prevent the escape and release of Hazardous Substances and their subsequent discharge in an unsafe and erroneous

manner is tantamount to a duty to Plaintiff not to interfere with or injure by virtue of contamination from Hazardous Substances, Plaintiff's ownership interests and unrestricted right, use and enjoyment of its Property.

45. Defendant Kim, individually or acting through each of his or its agents, servants and/or employees, failed to exercise ordinary care in the ownership, control and/or operation of the Dry Cleaners so as to not contaminate the soils and groundwater of Plaintiff's Property with Hazardous Substances.

46. Defendant Kim, individually or acting through each of his or its agents, servants and/or employees, failed to exercise ordinary care in the testing, operation, maintenance and utilization of the equipment, at the Dry Cleaners so as to prevent the escape and release of Hazardous Substances from the Dry Cleaners and their subsequent discharge onto and into the soils and groundwater of Plaintiff's Property.

47. Defendant Kim, and Defendants Dow and Harkrider individually or acting through its agents, servants and/or employees, failed to exercise ordinary care in regards to the dry cleaning chemicals and supplies so as to not interfere with or injure by virtue of contamination from hazardous substances Plaintiff's ownership interest and unrestricted right, use and enjoyment in Plaintiff's Property.

48. Defendant Kim, and substantially all of the other Defendants, by his and/or their negligent conduct, proximately caused Plaintiff to sustain damages arising from the contamination of Plaintiff's Property and interference and injury to Plaintiff's ownership interests and unrestricted right, use and enjoyment in Plaintiff's Property. In addition to general damages, Plaintiff has suffered and continues to suffer the following special damages

proximately caused by Defendant Kim's and substantially all of the other Defendants' negligence: consulting and investigative fees, damages for loss of use of Plaintiff's property, economic damages, lost profits, stigma damages and clean up costs.

49. Defendant AEC owed a duty to HTTL to conduct a competent environmental assessment. HTTL, as the purchaser of the property, and the borrower of the funds provided by MetroBank, was a reasonably foreseeable recipient of the information provided by AEC in its 1994 Phase I assessment report. HTTL's purchase of the property was the only impetus for MetroBank hiring AEC. AEC failed to exercise ordinary care in performing the environmental Phase I assessment that stated no contamination at the property existed. As a result of AEC's failure to exercise ordinary care, HTTL has been damaged in an amount of \$7,790,000.00.

COUNT 7 - NEGLIGENT MISREPRESENTATION

50. AEC engages in the business of preparing environmental reports, the purpose of which is to notify the recipient of the environmental conditions of their property. AEC knew or should have known by virtue of MetroBank, a lender, hiring it to do an environmental assessment that HTTL, as the borrower would rely upon the same. This information was provided for the guidance of HTTL in its business, namely the consideration of the environmental condition of the Property.

51. AEC failed to exercise ordinary care or competence in obtaining and communicating information regarding the reports to HTTL. In fact, AEC wrote that there was no significant environmental concern at the Property. This false information was relied on by HTTL to its detriment and was damaged as a result of the AEC misrepresentations and/or carelessness and incompetence.

52. HTTL seeks all damages incurred as a result of the respective wrongful conduct of AEC in the amount of at least the diminution in value of the property which is \$7,790,000.00.

COUNT 8 - PRODUCTS LIABILITY

53. Defendants Harkrider and Dow are manufacturers and/or sellers and/or distributors of chemicals used at the Property in dry cleaning operations. Defendants knew or should have known that such dry cleaning chemicals were used in connection with chemicals, which are hazardous materials as defined in law.

54. The perchloroethene used at the Property was defective and/or was unreasonably dangerous. Such defects in the chemicals, whether through defective design, defective labeling, inadequate warning, or defective manufacture, caused or contributed to cause damages to Plaintiff by permitting hazardous materials/contaminants to be released onto the Property and into the ground water. By manufacturing and/or supplying defective chemicals, the Defendants breached express and/or implied warranties to Plaintiff, including that such dry cleaning chemicals would be free from defects and were fit for the intended use. As a result of the breach of such warranties, Plaintiff has been damaged in the amount of \$7,790,000.00.

55. Defendants who manufactured and/or sold such hazardous chemicals failed to warn the users of the known, potential risks of use and/or misuse of such dry cleaning chemicals. Additionally, Defendants who manufactured and/or sold such defective dry cleaning chemicals failed to instruct and/or failed to adequately instruct and/or negligently instructed the users of such dry cleaning chemicals regarding safe operation of such equipment and use of such chemicals.

COUNT 9 - GROSS NEGLIGENCE OF THE KIM DEFENDANTS

56. The negligence of the Operators, as stated above, was of such a character as to make them guilty of gross negligence. The contamination of a drinking water source involves an extreme degree of risk. Their acts and/or omissions in failing to stop the migration of contaminants, and in otherwise continuing to interfere with HTTL's use of its Property after the contamination was discovered could have resulted only from actual conscious indifference to the rights, safety, and welfare of HTTL and others.

57. HTTL seeks all such actual and special damages as were proximately caused thereby, as well as exemplary damages to be determined by the trier of fact.

COUNT 10 - GROSS NEGLIGENCE OF DOW AND HARKRIDER

58. Dow's negligence, as set forth above, related to the manufacture and sale of the hazardous chemical perc which has contaminated HTTL's property is conduct that rises to a level of gross negligence. Dow's actions involving the manufacture and sale of perc were undertaken with malicious intent or conscious indifference as to the rights, safety and welfare of HTTL. As a result of Dow's malicious actions, HTTL has suffered substantial damage to its property. As a result of Dow's actions, HTTL is entitled to exemplary damages from Dow in an amount to be determined by the trier of fact.

59. Harkrider's negligence, as set forth more fully above, related to the distribution and sale of Dow's perc was undertaken with malicious intent or conscious indifference with regard to the rights, safety and welfare of HTTL. As a result of Harkrider's malicious actions, HTTL has suffered substantial damage to its property. Thus, Harkrider is entitled to exemplary damages from Harkrider in an amount to be determined by the trier of fact.

60. HTTL seeks all such actual and special damages as were proximately caused thereby as well as exemplary damages to be determined by the trier of fact.

COUNT 11 – GROSS NEGLIGENCE OF AEC

61. AEC's gross incompetence in failing to uncover the contamination at the property when performing the environmental assessment was done with malicious intent or conscious indifference with regard to the rights, welfare and safety of HTTL. Such action on the part of AEC has caused HTTL to sustain substantial damage. As a result of AEC's malicious intent or conscious indifference in its actions related to producing a sub-standard environmental assessment, HTTL is entitled to recover exemplary damages in an amount to be determined by the trier of fact.

COUNT 12 – DECLARATORY JUDGMENT

62. HTTL is entitled to a declaration pursuant to §37.001 et seq. of the Texas Civil Practice and Remedies Code that the Dae Kim, the Kim Defendants and Bell Cleaners are required to abate all hazardous substances contaminating the property, and ordered to take all actions necessary to stop and prevent the flow of contamination - whether through the soils or the groundwater or otherwise - into Plaintiff's property, and abate, remove and remediate all hazardous substances contaminating the soils and groundwater of Plaintiff's property.

63. HTTL is entitled to a declaration pursuant to §37.001 et seq. of the Texas Civil practice and Remedies Code that Dae Kim, the Kim Defendants and Bell Cleaners are required to indemnify and hold harmless Plaintiff from and against any and all claims, liabilities, obligations, costs, damages, losses and expenses, including attorneys' fees, that may arise in the future as a result of Kim Defendants' contamination of Plaintiff's Property;

OTHER MATTERS

64. HTTL pleads that the Operators, the Investigator, the Distributor, and the Manufacturer are liable for the acts of their agents because such agents acted as vice principals of such Defendants.

65. HTTL pleads, if necessary, the application of the discovery rule.

66. HTTL pleads, if necessary, the doctrine of fraudulent concealment.

67. HTTL pleads, if necessary, the doctrine of indivisible injury because it is impossible to scientifically tell exactly which Defendant caused any specific molecule of contamination but it is clear that the Operators were always in control of the portions of the Property that were contaminated.

68. HTTL pleads, if necessary, that the Defendants have failed to mitigate the damages in this case as they have taken efforts to increase, rather than reduce, the total amount of damages sustained by HTTL herein.

69. HTTL pleads, if necessary, waiver and estoppel.

70. HTTL additionally seeks such costs, and pre- and post-judgment interest as are allowed by law.

JOINT AND SEVERAL LIABILITY

71. Plaintiff alleges that Defendants Kim, Harkrider and Dow are jointly and severally liable as they have committed a "Toxic Tort" as that term is defined under § 33.011 (7) and §33.013 of the Texas Civil Practice and Remedies Code.

REQUEST FOR TRIAL BY JURY

72. HTTL requests a trial by jury and has tendered the jury fee.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays that Defendants be cited to appear and answer, and that on final trial Plaintiff have and recover against Defendants, jointly and severally:

(a) Damages for diminution in value of the subject property in the amount of \$2,210,000.00;

(b) In the alternative, Damages for diminution in value in an amount of at least \$7,790,000.00;

(c) Defendant Kim is required to abate all Hazardous Substances constituting or contributing to the contamination of Plaintiff's Property, and ordered to take all actions necessary to stop and prevent all flow of contamination — whether through the soils and groundwater or otherwise — into Plaintiff's Property, and abate, remove and remediate all Hazardous Substances contaminating the soils and groundwater of Plaintiff's Property;

(d) Defendant AEC is liable to Plaintiff for its consulting and investigative fees, the cost of remediation that has resulted from Plaintiff's reliance on Defendant AEC's false representation that the Shopping Center property was not contaminated, lost profits, stigma damages, damages for loss of use of Plaintiff's property in the amount of \$7,790,000.00;

(e) Plaintiff is entitled to a declaration that the Kim Defendants and Bell Cleaners are required to indemnify and hold harmless Plaintiff from and against any and all claims, liabilities, obligations, costs, damages, losses and expenses, including attorneys' fees, that may arise in the future as a result of Kim Defendants' contamination of Plaintiff's Property;

(f) A declaration that the Kim Defendants be required to abate all Hazardous Substances constituting or contributing to the contamination of Plaintiff's Property, and ordered to take all actions necessary to stop and prevent all flow of contamination — whether through the soils and groundwater or otherwise — into Plaintiff's Property, and abate, remove and remediate all Hazardous Substances contaminating the soils and groundwater of Plaintiff's Property;

(g) A declaration that the hazardous substances now on the Plaintiff's Property were released, disposed of and migrated from the Bell Cleaners, that the Kim Defendants are responsible for all costs, remediation, investigation, removal and disposal of hazardous substances now contaminating Plaintiff's Property, and that the Kim Defendants are jointly and severally liable for all past and future damages and costs, including all costs of remediation, investigation, removal and disposal associated with the Kim Defendants' contamination of Plaintiff's Property estimated to be in excess of \$7,790,000.00;

(h) Defendant Harkrider is liable to Plaintiff to the extent that the materials and supplies that they provided to Defendant Kim, and the use or misuse of such contributed to Defendant Kim's contamination of Plaintiff's property to the extent such materials and supplies were negligently and/or erroneously supplied; and/or Defendants Dow and Harkrider's negligent and/or erroneous instructions as to the volume, use and/or disposal of such materials and supplies contributed to Defendant Kim's contamination of Plaintiff's property;

(i) Defendant Dow is liable to Plaintiff to the extent that the materials and supplies that they provided to Defendant Kim, and the use or misuse of such contributed to Defendant Kim's contamination of Plaintiff's property to the extent such materials and supplies were negligently and/or erroneously supplied; and/or Defendants Dow's negligent and/or erroneous

instructions as to the volume, use and/or disposal of such materials and supplies contributed to Defendant Kim's contamination of Plaintiff's property;

(j) Defendants, except for Defendants Dow and Harkrider are liable for reasonable and necessary attorneys' fees pursuant to §§37.009 and 38.001 of the Texas Civil Practice and Remedies Code and §27.01 of the Texas Business and Commerce Code;

(k) Each of Defendants' acts and omissions singularly, and in connection with acts and omissions of other Defendants, were undertaken with malicious intent towards Plaintiff and/or with conscious disregard for the rights, welfare, and safety of Plaintiff and its Property. Accordingly, Plaintiff seeks exemplary damages in such an amount as may be found proper under the facts and circumstances.

(l) Costs of suit;

(m) Prejudgment and post-judgment interest as allowed by law, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

HIRSCH & WESTHEIMER, P.C.

By: 

Eric Lipper

State Bar No. 12399000

Olyn Poole

State Bar No. 24037292

700 Louisiana, 25th Floor

Houston, Texas 77002

Tel: (713) 223-5181

Fax: (713) 223-9319

ATTORNEYS FOR HENRY T.T. LUCKY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on 28th day of April, 2005, a true and correct copy of the foregoing was sent to the following parties:

CMRRR 7003 2260 0000 7320 7672

Jeffrey Nolan Diamant
Paul Fairfield
Ware, Snow, Fogel & Jackson, LLP
2929 Allen Parkway
42nd Floor
Houston, TX 77019

CMRRR 7003 2260 0000 7320 7689

Alexander Carl Chae
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 2400
Houston, Texas 77002-5007

CMRRR 7003 2260 0000 7320 7696

L. David Smith
Chernosky, Smith Ressler & Smith, PLLC
4646 Wild Indigo, Suite 110
Houston, Texas 77027

CMRRR 7003 2260 0000 7320 7702

Stacy K. Yates
Coats, Rose, Yale, Ryman & Lee
3 Greenway Plaza, Ste 2000
Houston, Texas 77046

CMRRR 7003 2260 0000 7320 7719

John D. Malone
John Malone, P.C.
P. O. Box 8030
Waco, Texas 76714-8030

CMRRR 7003 2260 0000 7320 7726


Richard W. Avery
Todd Collins
Glast, Phillips & Murray
815 Walker, Suite 1250
Houston, Texas 77002

CMRRR 7003 2260 0000 7320 7733

Jonathan B. Shoebottom
Thompson & Knight, LLP
333 Clay Street, Suite 3300
Houston, Texas 77002-4499

CMRRR 7003 2260 0000 7320 7740

Cecil Helderman (*Pro Se*)
4554 FM 1774
Plantersville, Texas 77363



Olyn Poole